No. 77-1757

In the Supreme Court of the United States

OCTOBER TERM, 1978

HEATH TEC DIVISION/SAN FRANCISCO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 566 F.2d 1367. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 13-27) is reported at 222 NLRB 981. The Hearing Officer's Report and Recommendation (App., *infra*, pp. 1a-14a) adopted by the Board in the related representation proceeding is not officially reported.

JURISDICTION

The decision of the court of appeals was entered on January 5, 1978. A petition for rehearing *en banc* was denied on March 15, 1978, and the judgment of the court of appeals was entered on March 27, 1978. The petition for a writ of certiorari was filed on June 12, 1978.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the employer was denied due process in a hearing on its objections to a representation election when the hearing officer revoked subpoenas requiring production of privileged documents and testimony from Board personnel.

2. Whether, in the circumstances of this case, the Board properly rejected the employer's claim that the Regional Office had proceeded with the representation election knowing that laboratory conditions had been destroyed by rumors that employees would be deported unless they voted for the union.

STATUTORY PROVISIONS INVOLVED

Section 8(a) of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. 158(a)), provides in relevant part:

[1] On July 5, 1978, Mr. Justice Rehnquist denied petitioner's motion to recall the mandate and stay the judgment of the court of appeals.

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. Pursuant to stipulations between petitioner Heath Tec (the Employer) and the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115 (the Union), a representation election was held on April 19, 1974, in a unit of production and maintenance workers in the Employer's plant in Hayward, California (Pet. App. 16).[2] The tally of ballots disclosed 10 votes for the Union, 7 against and 4 challenged ballots (Pet. App. 16, 17). The Employer filed 21 objections to the election, alleging, *inter alia*, that the Union and third persons had threatened employees with deportation unless they supported the Union and that the Board had conducted the election despite having knowledge that the requisite laboratory conditions for the election had been destroyed by the rumors of deportation. The Acting Regional Director investigated the objections

[2] Results of the two earlier elections had been set aside, the first on objections by the Employer and the second pursuant to a stipulation by the Employer and the Union (Pet. App. 16, n. 3).

and recommended that they be overruled in their entirety. She also recommended that three of the four challenged ballots be opened and that the Union be certified if at least two of these ballots were cast in favor of union representation (Pet. App. 16-17).

The Company filed exceptions and requested a new election or a hearing. On December 16, 1974, the Board ordered a hearing limited to the objections (Nos. 15-18) alleging threats and rumors of deportation and the Board's knowledge thereof (Pet. 5-6; Pet. App. 17). In connection with this hearing, the Employer served *subpoenas duces tecum* on the Board's Regional Director for Region 20 and on Edward Kaplan, the Board field agent who had conducted a preelection investigation of the claimed threats of deportation.[3] At the hearing, Board counsel moved for an order revoking the subpoenas since they directed the Board personnel to testify and produce documents from their investigative files.[4] The Hearing Officer,

[3] Prior to the election, the Employer had charged that the Union's participation in the alleged threats of deportation constituted unfair labor practices. The charge was investigated by field agent Kaplan and was dismissed by the Regional Director for lack of sufficient evidence on April 18, 1974, the day before the election. An appeal was denied on May 30, 1974 App., *infra*, pp. 5a-8a).

[4] Before serving the *subpoenas duces tecum* on Agent Kaplan and the Regional Director, the Employer had requested the General Counsel to authorize these persons to testify and produce documents from the Board's files (Pet. App. 17). The General Counsel denied the request by letter, referring to the confidentiality of investigative files, but stated that the denial did not "preclude an appropriate renewal of the request at the hearing where the necessity of the requested testimony can be established" (Board Exh. 10).

relying on Section 102.118 of the Board's Rules and Regulations, 29 C.F.R. 102.118 (Pet. App. 43-47), granted the motion to revoke the subpoenas. After the hearing was completed, the Hearing Officer issued a report recommending that the objections be overruled (App., *infra*, pp. 1a-14a).

The Employer filed exceptions to the Hearing Officer's report, reiterating its contentions with respect to deportation rumors and claiming additionally that the revocation of the *subpoenas duces tecum* constituted a denial of a fair hearing. On July 30, 1975, the Board denied the exceptions and adopted the findings and recommendation of the Acting Regional Director and the Hearing Officer (Pet. App. 18). Thereafter, the challenged ballots were talleyed and the final count showed 13 votes cast in favor of the Union, 7 against and 1 undetermined. The Union was certified on August 28, 1975 (Pet. App. 19).

In order to obtain judicial review of the Board's decision, the Employer refused to bargain with the Union (Pet. App. 3). The Board, finding that the Employer had thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act, entered a bargaining order (Pet. App. 13-26). The Employer appealed on the ground that its refusal to bargain was lawful because the election should have been set aside.

2. The court of appeals enforced the Board's order. The court held (Pet. App. 10) that the Employer was not denied a fair hearing by the revocation of the subpoenas because, even though the Hearing Officer had

erred in resting his ruling solely on the Board's regulation, the Employer had not made an adequate showing of prejudice. The court observed (Pet. App. 9-10) that "any prejudice to Heath Tec resulted from its own presentation at the hearing—and not from the erroneous ruling—since there was no attempt on the part of Heath Tec first to meet its evidentiary needs on its own rather than having to rely on privileged testimony." With regard to the claim that laboratory conditions were significantly impaired by the claimed rumors and threats of deportation, the court held (Pet. App. 10-11) that the source of the rumors was not shown and that, on the record before it, the Board "could have reasonably concluded that Heath Tec did not establish *prima facie* grounds for setting aside the election."

ARGUMENT

1. The court of appeals correctly held that the testimony and documents sought by the Employer were privileged and that the Employer failed to make an adequate showing of need to overcome that privilege (Pet. App. 9). Accordingly, even if the Hearing Officer erred in relying solely on the Board's rule,[5] the subpoenas were nonetheless properly revoked.

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[5] Since reliance on the Board's rule is immaterial, the Employer's contentions (Pet. 16-17) with respect to 5 U.S.C. 301 would be irrelevant even if that provision, which governs regulations issued by the "head of an Executive department or military department," applied to independent agencies such as the Board.

As the Employer concedes (Pet. 12-13, 19), it was seeking to obtain the testimony of the Regional Director and Board Agent Kaplan to establish what was in their minds when they were investigating and considering the merits of the Employer's unfair labor practice charge concerning alleged deportation threats by union agents. The Employer was also seeking "witness statements [and] interview notes and opinions of the Regional Office of the Board concerning the decision" to dismiss the charge (*id.* at 19). As the court of appeals noted (Pet. App. 5-6), the General Counsel invoked "the recognized privilege of preserving the confidentiality of investigative files" in denying the Employer's request that the specified witnesses and files be made available. See note 4, *supra*. See also *Stephens Produce Co., Inc.* v. *National Labor Relations Board*, 515 F.2d 1373, 1376 (C.A. 8); *J. H. Rutter Rex Manufacturing Co., Inc.* v. *National Labor Relations Board*, 473 F.2d 223, 231 (C.A. 5), certiorari denied, 414 U.S. 822. The materials requested by the Employer were protected not only by the privilege of confidentiality for investigative files, but also by the privilege of confidentiality for the deliberative processes of agency decisionmakers. See *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184; *Morgan* v. *United States*, 304 U.S. 1, 18; *Kent Corp.* v. *National Labor Relations Board*, 530 F.2d 612, 618-621 (C.A. 5), certiorari denied, 429 U.S. 920.[6]

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[6] *Grumman*, *supra*, and *Kent*, *supra*, are cases originally brought in federal district courts under the Freedom of In-

The Employer implicitly contends, however (Pet. 12-15), that it overcame any privilege by making an adequate showing of need for the information even though it failed to call any employee witnesses to support its objections. Specifically, the Employer contends (1) that employee witnesses could have provided only hearsay evidence regarding Objections 17 and 18 which alleged that the Board had improperly con-

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formation Act (FOIA), as amended, 5 U.S.C. 552. These cases discuss traditional evidentiary privileges incorporated in FOIA exemptions. The present case, by contrast, is here following appellate review of a Board proceeding under Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e). The two statutory schemes are independent, and the Employer's FOIA claim (Pet. 17-19) is not properly presented in this proceeding. See *United States* v. *Murdock*, 548 F.2d 599, 602 (C.A. 5). Nor would the FOIA in any way buttress the Employer's claim that the denial of the discovery it sought constituted a denial of due process, for "[n]othing new by way of due process emerged with the FOIA," nor was it intended to serve as a discovery tool for litigants. *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 22, 24. Accord: *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, No. 77-911, decided June 15, 1978. Even if a FOIA claim were properly presented, the Act clearly would not apply to any of the testimony sought. Moreover, the documents sought by the Employer in connection with the ongoing Board proceeding would fall within Exemptions 5 and 7(A) of the FOIA. See *National Labor Relations Board* v. *Robbins Tire & Rubber Co., supra* (witness affidavits in unfair labor practice proceeding); *New England Medical Center Hospital* v. *National Labor Relations Board*, 548 F.2d 377 (C.A. 1) (documents in "closed" file related to pending unfair labor practice proceeding); *Kent Corp.* v. *National Labor Relations Board, supra* (final investigation reports pertaining to dismissed unfair labor practice charges).

ducted the representation election after gaining actual knowledge that laboratory conditions had been destroyed by widespread circulation of deportation rumors, and (2) that it was prevented from questioning its employees on this subject because it would thereby be committing an unfair labor practice under the doctrine established in *Johnnie's Poultry Co.*, 146 NLRB 770, enforcement denied on other grounds, 344 F. 2d 617 (C.A. 8). These contentions are without merit.

In order to establish the facts alleged in Objections 17 and 18, it would be essential first to establish that laboratory conditions had in fact been destroyed. If laboratory conditions had not been destroyed, then the Board could not have had "actual knowledge" of such a circumstance. The primary source of information on this subject would be the plant employees. The employees would know, among other things, what the rumors were, who had circulated them, who had heard them, and whether those who had heard them were in fact aliens without proper immigration papers and thus likely to be affected by such rumors. Of course, if employee testimony on these matters established that laboratory conditions had actually been destroyed, this testimony alone would warrant setting aside the election; evidence of Board knowledge prior to the election would then be superfluous. Thus, only if the employees were unavailable to testify would any evidence in the Board's files be needed. The Employer, however, made no showing that it was unable to subpoena employees likely to have knowledge on the sub-

ject. Indeed, as the court of appeals noted (Pet. App. 9), the Employer had provided from six to nine employees to Board agents for interviews at the plant regarding the Employer's unfair labor practice charge, and therefore had reason to know who would have relevant information.[7]

Contrary to its contention (Pet. 12-13), the Employer would not have "run afoul" of the rule in *Johnnie's Poultry Co.*, *supra*, had it sought to establish its case through questioning its employees. The crucial fact for the employer to have established was not whether employees had given statements to the Board but what the employees knew about the alleged deportation rumors. *Johnnie's Poultry Co.* is no bar to such questioning, for it holds only that, when an employer interviews its employees in connection with unfair labor practice proceedings, it must communicate to the employees the purpose of the questioning, assure them that no reprisals will take place, and obtain their participation on a voluntary basis. 146 NLRB at 775.

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[7] This case is therefore distinguishable from *Firestone Synthetic Fibers Co.* v. *National Labor Relations Board*, 374 F. 2d 211 (C.A. 4), relied on by the Employer (Pet. 11). In that case, the court held that the General Counsel's burden of proof to establish a Section 8(a)(1) violation might be greater than usual where he declined to identify or call certain witnesses who were present at the incident in question and who could either corroborate or contradict the charging party's testimony. The court observed that the employer could not call the witnesses because it was unaware of their identity. *Id.* at 214.

In sum, the court of appeals properly held that the Employer was not denied due process or a fair hearing. Any prejudice to the Employer's case stemmed from its own failure to avail itself of nonprivileged evidence and not from the revocation of its subpoenas for privileged evidence from Board files and Board personnel.

2. The Board did not abuse its discretion in declining to set aside the representation election on the basis of the Employer's claim, in Objections 17 and 18, that the election was improperly held at a time when Board personnel knew that laboratory conditions had been destroyed by deportation rumors. Where, as in this case, there is no showing that any party to the election was responsible for the allegedly coercive conduct, the Board will set aside the election only if the conduct is shown to have created an atmosphere of fear and reprisal that precludes employees from freely expressing their choice. *National Labor Relations Board* v. *Bostik Division, USM Corp.*, 517 F.2d 971, 973-975 (C.A. 6); *National Labor Relations Board* v. *Staub Cleaners, Inc.*, 418 F.2d 1086, 1088 (C.A. 2), certiorari denied, 397 U.S. 1038; *Intertype Co.* v. *National Labor Relations Board*, 401 F.2d 41, 45-46 (C.A. 4), certiorari denied, 393 U.S. 1049. Since the evidence presented by the Employer in this case failed to establish that rumors had been circulated among employees who had any reason to fear deportation or that there was, for any other reason, an atmosphere of fear and reprisal, the Board

was warranted in overruling the Employer's objections.[8] Further review of this factual question in this Court is unnecessary.

The Employer's reliance (Pet. 21) on cases where the misconduct of Board personnel casts doubt on the existence of laboratory conditions is misplaced. The only facts alleged in support of its contention that there was such misconduct here are (1) that Board Agent Kaplan remarked, after investigating the Employer's unfair labor practice charge, that there was "no doubt" that a deportation rumor was "going around" in the plant, although the rumor could not be connected to Union agents (Pet. 4-5); and (2) that the Regional Office thereafter dismissed the unfair labor practice charge and denied the Employer's request for a postponement of the election (Pet. 5). Board Agent Kaplan's remark indicated, however, only that he believed that a deportation rumor was circulating—not that he believed laboratory conditions had been destroyed. Moreover, the Board assured that the rights of all parties to a fair election were protected by following standard procedure in considering the objections filed in the post-election proceedings. There is nothing in this sequence of events that could reasonably be characterized as misconduct—let alone the type of misconduct involved in the cases on which

[8] The Employer's evidence was limited to the vague and conflicting hearsay testimony of its plant manager and one of its attorneys (App., *infra*, pp. 4a-12a; Tr. 8-71, 72-129).

the Employer relies.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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General Counsel,

JOHN E. HIGGINS, JR.,
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AUGUST 1978.

[9] *Provincial House, Inc.* v. *National Labor Relations Board*, 568 F.2d 8, 11 (C.A. 6), concerned a Board agent who went to a restaurant meeting room to take employee affidavits in an unfair labor practice investigation and ended up by becoming "a part of [a] union organizing meeting." In *Delta Drilling Co.* v. *National Labor Relations Board*, 406 F.2d 109 (C.A. 5), a Board agent spent time in a union agent's room, as a stopover on his trip from one election polling place to another. *National Labor Relations Board* v. *Bata Shoe Co.*, 377 F.2d 821 (C.A. 4), certiorari denied, 389 U.S. 917, involved substantial procedural irregularities that allowed employees who lined up after the polls closed to vote while permission to some who arrived on time was denied. Finally, in *Glacier Packing Co., Inc.*, 210 NLRB 571, the Board agent ripped off badges worn by the employer's election observers and generally behaved in a manner suggesting "that the Board was opposed to the Employer's position in the election." *Id.* at 573.

APPENDIX

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Region 20

Case No. 20-RC-11428

HEATH TEC FINISHES DIVISION/SAN FRANCISCO
EMPLOYER

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115
PETITIONER

Harry Finkle, Esquire of San Francisco, California,
for the Employer

Robert J. Carter, Grand Lodge Representation of
Hayward, California, for the Petitioner

Marian Kennedy Pollack, Esquire of San Francisco,
California, for the Regional Office, Region 20

Before: *Tony Bisceglia*, Hearing Officer.

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Pursuant to a stipulation of the parties, a second rerun election by secret ballot was conducted on

April 19,[1] under the direction and supervision of the Regional Director for Region 20 in a unit of all production and maintenance employees employed at the Employer's facility in Hayward, California including shipping and receiving employees, inspectors and drivers; excluding office clerical employees, professional employees, salesmen and guards and supervisors as defined in the Act.

Upon the conclusion of the second rerun election, each party was furnished with a tally of ballot which showed that of approximately 21 eligible voters, 10 cast ballots for and 7 cast ballots against the Petitioner and 4 ballots were challenged. The challenged ballots are sufficient in number to affect the results of the election and timely objections to the election were filed by the Employer.

On August 21, 1974, the Acting Regional Director for Region 20 issued her Report on Objections and Challenged Ballots recommending that the objections be overruled in their entirety and that certain challenged ballots be opened.

On December 16, 1974, the Board issued an Order Directing Hearing for the purpose of receiving evidence to resolve the issues raised by Employer's Objections 15, 16, 17 and 18.

This matter was heard at San Francisco, California, on January 20, 1975, pursuant to the above-referenced Order Directing Hearing and a Notice of Hearing issued by the Regional Director for Region 20 on January 2, 1975.

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[1] All dates are 1974 unless otherwise specified.

The objections in their entirety are as follows:

15. The Union by its representatives, agents, and/or persons closely allied therewith acting with the consent and/or approval of the Union, coerced, threatened and intimidated Spanish-speaking employees of the Employer by representing to said employees that unless said employees supported the Union and voted for the Union in the election that the Union and/or its agents would harass the employees by having their immigration papers revoked with the consequence that they would lose their employment and be expelled from the United States.

16. Third persons coerced, threatened and intimidated Spanish-speaking employees of the Employer by representing to said employees that unless said employees supported the Union and voted for the Union in the election that the Union and/or its agents would harass the employees by having their immigration papers revoked with the consequence that they would lose their employment and be expelled from the United States with the consequence that necessary and essential laboratory conditions were destroyed.

17. The National Labor Relations Board with conclusive knowledge, resulting from an NLRB investigation at the Employer's premises and in which employees were interviewed by NLRB agents, that rumors were widespread among the employees that unless the employees voted for the Union their immigration papers would be examined and they would bze expelled from

the United States, proceeded to conduct the representation election thereby interferring with the election process and the rights of employees to a fair and free election conducted in an atmosphere free from coercion, threats and intimidation.

18. The National Labor Relations Board had actual knowledge, received through an NLRB investigation at the Employer's facility and from employee interviews conducted by NLRB agents, that the necessary laboratory conditions essential to a valid representation election were not present, but completely destroyed at the Employer's facility. With such knowledge, the National Labor Relations Board proceeded to conduct a representation election thereby depriving employees of a fair and free election conducted in an atmosphere free from coercion, threats and intimidation.

All parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to present evidence pertinent to the issues, and to argue orally at the conclusion of the taking of evidence.

Upon the entire record of the hearing and from my observation of the witnesses, I make the following findings of fact, conclusions and recommendation:

FINDINGS OF FACT

Esequiel Rodriquez, a supervisor, testified[2] that about one or two weeks before the election conducted

[2] Rodriquez, although not very articulate, initially answered questions without the aid of an interpreter. As the questions became more complex, the parties agreed to the use of an interpreter. After the interpreter arrived the parties were allowed to re-ask, through the interpreter, any questions previously asked. I am satisfied that the witness understood all questions which he answered prior to the arrival of the interpreter.

by the Board on April 19, Felipe, whose last name was unknown to the witness, talked to a group of about two to four employees in the plant for about two or three minutes. Rodriquez testified that Felipe told the employees that if they didn't vote for the Union immigration would come into the plant to take somebody. Rodriquez did not participate in this conversation, but was standing four or five feet away. Rodriquez does not recall the names of the employees, nor does he recall anything else that Felipe said. Further, Rodriquez does not recall the reaction, if any, of the employees, does not know if the employees had proper immigration papers, and did not hear the employees say anything to Felipe.

Rodriquez also testified that an employee whose name he does not recall told him about a week or two before the April 19 election that employee Wolfrano Ruiz told this unnamed employee that someone would bring in immigration if the employees didn't vote for the Union. Rodriquez testified that the unnamed employee did not tell him when Ruiz allegedly made the statement. Ruiz was terminated approximately one month prior to the April 19 election. An affidavit taken from Rodriquez on April 17 by Board Agent Edward Kaplan from Region 20 of the Board was introduced as evidence at the hearing. Rodriquez

testified that Kaplan read the statement to him in English, that his supervisor, Garcia, read, in Spanish, the parts of the affidavit that he did not understand in English. Rodriquez states in his affidavit, "I do not recall any employees by name who mentioned that anyone not having proper papers or who did not vote for the Union would be deported." Rodriquez testified that he recalled making the above statement to Kaplan. He further testified that he told Kaplan the truth, but that some of the statements made at this hearing were not made to Kaplan at the time the affidavit was taken because Kaplan did not ask him those questions.

I find it inconceivable that Rodriquez would recall approximately nine months after the April 19 election that Felips told other employees that if they did not vote for the Union the immigration would come, when in a sworn statement given to the Board less than two weeks after the alleged statement made by Felipe, he testified that he did not recall by name any employees who said that anyone not voting for the Union would be deported.[3] Moreover, Rodriquez' testimony at the hearing was extremely vague in so far as his recollection of what Felipe had said. Additionally, he could not recall the reaction or response of the unnamed employees to whom Felipe was allegedly speaking. From my observation of Rodriquez' demeanor on

[3] I am satisfied that the words "immigration" and "deportation", as used in the context of Rodriquez' affidavit and testimony at the hearing, have the same connotation and that the witness did not believe that they had different meanings.

the witness stand and the record as a whole, I credit Rodriquez only to the extent that his testimony was not contradicted by the above-mentioned part of his April 17 affidavit.

I am not discrediting Rodriquez with respect to his testimony about Ruiz since there is nothing inconsistent between the above-mentioned statement from Rodriquez' April 17 affidavit and his testimony as to what Ruiz allegedly told the unnamed employee. It is possible that this heresay statement may not have been included in the April 17 affidavit.

The Employer's only other witness was Alan B. Carlson, an attorney with the law firm of Littler, Mendelson and Fastiff. This firm has represented the Employer throughout the entire representation proceedings. Carlson testified that on April 12, he filed a charge against the Petitioner alleging a violation of Section 8(b)(1)(A)[4] of the Act. The charge alleged, in pertinent part,

> "Since on or about March 1, 1974, the Union by its representatives, agents, and/or persons closely allied therewith acting with the consent and/or approval of the Union, have coerced, threatened and intimidated Spanish-speaking employees of the Employer by representing to them that unless they support and join, and pay initiation fees and monthly dues to the Union, the Union or its agents will harass them by having

[4] While testifying Carlson incorrectly referred to the charge as a charge alleging a violation of Section 8(a)(1). It is clear from the record that he meant Section 8(b)(1)(A).

the employees' work permits revoked, and by acting to have the employees stripped of their jobs and expelled from the United States."

This charge against the Petitioner was dismissed on April 18. The Region's dismissal letter recites insufficient evidence to conclude that there was a violation as the basis for the dismissal. The Employer's appeal to the dismissal was denied on May 30.

Carlson testified that on April 17 he met Kaplan and another Board Agent at the Employer's premises for the purpose of providing witnesses to substantiate the unfair labor practice charge. Carlson estimates that five to eight employees plus Rodriquez were provided to the Board Agents for this purpose and that the Board Agents interviewed all witnesses in private. Carlson received a copy of supervisor Rodriquez' affidavit, but did not receive copies of any of the affidavits taken from employees. Carlson testified that after both Board Agents finished interviewing the witnesses, he asked Kaplan if he found anything during the course of his investigation. According to Carlson, Kaplan replied, "It is going around out there. That is, the people who do not vote for the Union, that they would be deported. I am having trouble connecting it to the Union." Carlson then told Kaplan that his statement pertained to the unfair labor practice charge, but not necessarily whether an election should be held.

Carlson testified that on April 18, Kaplan again told him the rumor was going around at the plant that if the people did not vote for the Union they would be

deported, but that the Board did not have enough evidence to connect it to the Union. Carlson also testified that on April 17 and 18, he sent letters to Roy O. Hoffman, Regional Director of Region 20, asking that the election scheduled for April 19 be postponed due to the Petitioner's conduct. In addition, Carlson testified that on April 17, the Petitioner filed an unfair labor practice charge against the Employer, alleging that Wolfrano Ruiz, among others, was terminated because of his union activities. Carlson reasoned in his April 18 letter to Hoffman and at the hearing that since it was alleged by the Petitioner that Ruiz had engaged in Union activities, perhaps this would establish a connecting link between the Union and the statements going around the plant.

Both Hoffman and Kaplan were subpoenaed to appear at the hearing. The Employer made a request to Peter G. Mash, General Counsel of the National Labor Relations Board, to give written consent allowing Hoffman and Kaplan to testify and present certain documents. By letter, the General Counsel denied the Employer's request, but stated that the denial did not preclude the renewal of the request at the hearing in circumstances where the necessity of the requested testimony could be established. The Regional Office Representative presented a Petition to Revoke at the hearing. Although the Employer renewed his request for the testimony of Hoffman and Kaplan at the hearing, the Petition to Revoke was granted based on Section 102.11S of the Board's Rules and Regulations. A Hearing Officer does not have the authority to com-

pel a Regional Director or Board Agent to testify and present documents without the express permission of the General Counsel or the Board.

ANALYSIS AND CONCLUSIONS

Objection No. 15:

Carlson was the only witness at the hearing who presented evidence pertaining to the agency status of any individual making statements to employees. In this regard Carlson testified that in an unfair labor practice charge filed against the Employer it was alleged that Ruiz had participated in union activities. Carlson reasoned that Ruiz' alleged participation in union activities coupled with the statement he allegedly made to the unnamed employee would establish a link between the Union and the statement. Assuming, *arguendo*, that Ruiz had engaged in union activities, the mere fact that an employee is prominent in an organizing campaign does not establish that the employee is acting as an agent of the Petitioner.[5] I find that there is insufficient evidence to establish that any representatives or agents of the Petitioner or persons closely allied with the Petitioner made any statements to any employees.

Objection No. 16:

While the Board will consider conduct not attributable to any of the parties in determining whether an

[5] *Owens-Corning Fiberglas Corporation*, 179 NLRB 219; *Electric Wheel Company*, 120 NLRB 1644.

election should be set aside, the Board accords less weight to such conduct than to the conduct of the parties.[6] The test to be applied in determining whether an election wil be set aside on the basis of conduct not attributable to one of the parties is whether the character of the conduct was so grievous as to create a general atmosphere of fear and reprisal rendering a free expression of choice impossible.[7]

The gravamen of the Employer's brief submitted in this matter is that an election conducted in an atmosphere of confusion, anxiety, coercion, threats of violence and personal retaliation, fear of reprisal and actual violence, should be set aside. Several cases are cited which are pertinent when the above conditions exist at the time of the election. However, I do not find that the above conditions existed prior to the April 19 election.

On the basis of the credited evidence, there were only two facts brought out that pertain to this objection. The first is that an unnamed employee told Rodriquez, a supervisor, that Ruiz, an employee, had said that immigration would come in if employees did not vote for the Union. Rodriquez was not told when Ruiz allegedly made the statement. The second fact is that after the Board Agents interviewed five to eight employee witnesses, and Rodriquez, he informed Carlson that deportation rumors were going around

[6] *Orleans Manufacturing Company*, 120 NLRB 630.

[7] *Central Photocolor Company, Incorporated*, 195 NLRB 839.

in the plant. There was no evidence presented at the hearing that would indicate that any of the employees had any reason to fear the statement allegedly made by Ruiz or had any reason to fear the alleged rumors. There was no evidence that Rodriquez informed any employees of the statement allegedly made by Ruiz. No employee witnesses were presented at the hearing. (Moreover, Counsel for the Regional Office, whose primary function is to see that evidence adduced during the Region's investigation becomes part of the record, proffered no evidence pertaining to what employees were told.)

The burden is on the Objecting Party to show that there has been prejudice to the fairness of the election.[8] This burden has not been met by the Employer. The only testimony provided on this objection was hearsay. Without direct evidence pertaining to what employees were actually told by other employees or third persons, I am unable to find that a general atmosphere of fear and reprisal existed that would be sufficient to set aside the election.

Objection Nos. 17 and 18:

These objections are based on Kaplan's statements to Carlson that deportation rumors were going around at the plant. Other than Carlson's testimony pertaining to what Kaplan said, there was no testimony or evidence presented at the hearing that Region 20 had actual and/or conclusive knowledge that there were

[8] *N.L.R.B.* v. *Golden Age Beverage Co.*, 415 F. 2d 26.

widespread rumors of deportation and/or that the necessary laboratory conditions for a fair and free election did not exist. It appears that, until this hearing, Region 20 had no knowledge of Rodriquez' statements, made at the hearing, pertaining to Ruiz and Felipe since no mention of the two incidents were made in the affidavit given to Kaplan by Rodriquez. Although it appears from Carlson's testimony that Kaplan was of the opinion that there were certain deportation rumors circulating at the plant, this opinion does not necessarily reflect the opinion of the Regional Director. A statement or commitment by a Board Agent during the course of an investigation does not necessarily indicate that the Regional Director is in concurrence with the statement or commitment.[9] Moreover, the rights of the parties are protected by post election objection procedures as provided in Section 102.69 of the Board's Rules and Regulations. The Regional Director is not precluded from conducting an election particularly where, as here, the only possible way to remedy objectionable conduct by any of the parties is through the filing of objections to such conduct *after the election has been held.*

Based on the above analysis, Carlson's testimony and the record as a whole, I do not find that the Regional Director, prior to the election, had any

[9] See *Zimnox Coal Company*, 140 NLRB 1229; *United Association of Journeymen, Local 106, (Columbia-Southern Chemical Corporation)*, 110 NLRB 206; and *Milwaukee Nash Company*, 105 NLRB 684.

knowledge of widespread deportation rumors or a lack of the laboratory conditions necessary for a free and uncoerced election. Moreover, I find that the Regional Director properly conducted the election on April 19.

RECOMMENDATION

Upon the foregoing facts, analysis and conclusions, the undersigned recommends that the Board overrule the Employer's Objections 15, 16, 17 and 18 and that if, after opening the challenged ballots, the Petitioner receives a majority of the ballots cast, the Petitioner be certified as the bargaining representative.[10]

Dated at Los Angeles, California this 17th day of March 1975.

/s/ Tony Bisceglia
TONY BISCEGLIA
Hearing Officer
National Labor Relations Board
Region 31
12th Floor, Federal Building
11000 Wilshire Boulevard
Los Angeles, California 90024

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[10] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Such exceptions must be received by the Board in Washington by March 31, 1975.

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